BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of	)	94-123
	)	
Amendment of Section 73.658(k) of the Commission's Rules to Delete the "Off-Network" Program Restriction	)	MMB File No. 920117A
Amendment of Section 73.658(k) of the Commission's Rules to Delete the "Off-Network" Program Restriction	)	MMB File No. 870622A
Constitutionality of Section 73.658(k) of the Commission's Rules ("Prime Time Access Rule")	)	MMB File No. 900418A

COMMENTS OF THE ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.

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SUMMARY

The petitioners have failed to present any valid argument for further inquiry concerning the Prime Time Access Rule. The Prime Time Access Rule hardly is suspect; it is a notable success story in the annals of rational regulation in public interest. During the past 20 years, the Prime Time Access Rule has promoted the growth and development of independent television. As a result, the public enjoys more media voices in many television markets, first run *prime time* syndicated programming is beginning to develop, stronger independent stations are offering more news and local programming, and emerging and fledgling networks find a base of stations from which to spin a web of affiliates.

In the face of this, the petitioners call the Prime Time Access Rule unsound and unconstitutional. Yet, from the moment of adoption, the Prime Time Access Rule epitomized sound and rational regulation, which was upheld readily by the courts as rational and constitutional. No less so, the off-network prohibition has been a necessary adjunct to the Prime Time Access Rule. The Commission consistently envisioned the rule as opening a window in prime time for non-network programming.

Petitioners point to the Network Inquiry Special Staff Report's complaint that the access period is populated by game shows, but such arguments steer the Commission towards making regulatory decisions on the

basis of program content -- something it wisely has eschewed throughout its administration of the Prime Time Access Rule. They similarly embrace the NISS Report's conclusion that the benefit of the rule has flowed strictly to an already-successful first-run production industry; but, this, too, ignores the Commission's primary concern for promoting competition and diversity, not the interests of any particular industry. Petitioners also note changes in the video marketplace which, they say, eliminate the need for the off-network prohibition. However, their view is myopic and self-interested. They do little more than whine about their inability to schedule off-network programs during prime accesss, while ignoring the demonstrable benefits of the rules.

Finally, they raise no valid question about the constitutionality of the rule. Their arguments, again, presume wrongly that the rule has served no purpose. They also take a "wish list" approach to the proper level of First Amendment scrutiny for broadcast regulation, suggesting that the *Red Lion* decision, based on the so-called "scarcity" rationale, has been undercut by changes in the video marketplace. Yet, no court has overruled *Red Lion* or embraced the Commission's once-stated *dicta* that the scarcity rationale is obsolete.

Therefore, no further inquiry into the Prime Time Access Rule is called-for by the three petitions, and INTV urges the Commission to deny them and let the public continue to enjoy the benefits of the rule.

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COMMENTS OF THE
ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.

The Association of Independent Television Stations, Inc. ("INTV"), hereby submits its comments on the above-referenced requests for Commission action with respect to §73.658(k) of the Commission's Rules and Regulations (the "Prime Time Access Rule").[1] INTV is a non-profit, incorporated association of independent broadcast television stations (*i.e.*, broadcast television stations affiliated with none of the three established broadcast television networks).[2]

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[1]These comments are filed timely, pursuant to the Commission's *Public Notice* of April 12, 1994.

[2]Many of INTV's member stations are affiliates of the Fox Network.

I. INTRODUCTION

A. The Narrow Range Of Arguments Raised By Petitioners Beget No Broad Inquiry Into Either The Prime Time Access Rule Or The Off-Network Prohibition.

The three pending petitions initiate no broad-ranging inquiry into the Prime Time Access Rule. First Media, Inc., asks the Commission to declare the Prime Time Access Rule unconstitutional on its face.[3] Channel 41, Inc., and Hubbard Broadcasting, Inc., raise no question about the Prime Time Access Rule itself, but seek commencement of a rule making looking toward repeal of only the so-called "off-network prohibition."[4] The former petition asks the Commission to leapfrog a policy determination and exercise the power reserved to the courts to rule on the constitutionality of a federal regulation.[5] The two latter petitions present various arguments purportedly demonstrating the need to initiate further proceedings. INTV herein responds vigorously to three pending petitions, but only to the arguments raised by each of the three petitioners. No broad defense of the Prime Time Access Rule is called-for at this time. INTV can and will mount a full-scale

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[3]Petition for Declaratory Ruling, MMB File No. 900418A (filed April 18, 1990) [hereinafter cited as "First Media Petition"].

[4]Petition for Rulemaking [*sic*], MMB File No. 780622A (filed April 24, 1987), [hereinafter cited as "Channel 41 Petition"]; Petition for Rule Making, MMB File No. 920117A (filed January 17, 1992) [hereinafter cited as "Hubbard Petition"].

[5]Petition for Declaratory Ruling, MMB File No. 900418A (filed April 18, 1990) [[hereinafter cited as "First Media Petition"].

defense of the Prime Time Access Rule and/or the off-network prohibition at such time as it may become appropriate.

Hubbard also points to several other proceedings in which the issue of eliminating or modifying the Prime Time Access Rule has been raised.[6] INTV respectfully submits that to the extent their arguments concerning the Prime Time Access Rule or the off-network prohibition are beyond the scope of the three petitions upon which the Commission has sought comment, they are out-of-place in this proceeding. Furthermore, these various petitions and comments already have been subject to public comment and are outside the scope of the current petitions. INTV has responded, for example, to the arguments expounded by The Walt Disney Company ("Disney") and CBS, Inc. ("CBS").[7] Until such time as the Commission seeks additional comments on these other requests, no additional comment is called-for or appropriate. Suffice it to say for present purposes, INTV reserves its right to respond to their arguments at such other time as may be appropriate. Again, therefore, INTV limits its comments herein to the specific arguments raised in the three petitions upon which the Commission has requested comment.

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[6]Hubbard Petition at 10.

[7]Further Reply Comments of the Association of Independent Television Stations, Inc., MM Docket No. 90-162 (filed December 21, 1990); Reply Comments of the Association of Independent Television Stations, Inc., MM Docket No. 91-221 (filed December 19, 1991).

B. Petitioners Bear the Burden of Showing the Need for Further Inquiry.

Also by way of setting the stage, INTV reminds the Commission that the petitioners bear the burden of showing the need for a re-examination of the Prime Time Access Rule or off-network prohibition. Neither INTV nor any other party is called to justify rules which have a long history of success and which have enjoyed judicial affirmation. The burden of showing that a change in the rules would serve the public interest falls on those who seek the change.[8] This is particularly true where, as shown herein, petitioners offer only arguments laced with their own self-interest rather than the overall public interest.

C. Further Inquiry Into The Operation Of Or Need For The Prime Time Access Rule Would Be Premature At This Time.

Further inquiry into the Prime Time Access Rule or off-network prohibition would be premature. The Commission still is in the process of phasing out the network financial interest and syndication rules.[9] The phase-

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[8] *See* Memorandum in Support of Comments of the Association of Independent Television Stations, Inc., previously submitted by INTV in MM Docket Nos. 90-162 and 91-221 and attached hereto as Exhibit 1.

[9] Under the phase-out process initiated by the Commission, the remaining network financial interest and syndication rules will sunset in November, 1995, unless the Commission decides otherwise in a proceeding to be initiated in May, 1995. *Second Report and Order*, 8 FCC Rcd 3282 (1993), *reconsideration granted in part and denied in part*, 8 FCC Rcd 8270 (1993), *petitions for review pending sub nom. Capital Cities/ABC, Inc. v. FCC*, Nos. 93-3458 *et al.* (7th. Cir., filed May 24, 1993). The Commission's decision, however, presently is subject to review in the United States Court of Appeals for the Seventh Circuit. Oral argument has been scheduled for June 14, 1994. The court's decision will determine the propriety and efficacy of the Commission's decision and, obviously, could affect the Commission's timetable for complete elimination of the financial interest and syndication rules. INTV, for example, has urged the court to hold the two-year presumed sunset arbitrary and capricious and remand the case to the Commission for

out of these rules portends significant changes in the video marketplace and the syndication marketplace, particularly with respect to network involvement and conduct as recent re-entrants into network and first-run program production and first-run and off-network syndication. Similarly, the few remaining provisions of the network consent decrees will be expiring over the next several years.[10]

The removal of these restrictions on network activity also will open the door to significant changes in the program production, network exhibition, and syndication markets. Consequently, the Commission would be attempting to predict the consequences of maintaining, modifying, or eliminating the Prime Time Access Rule in a fluid and shifting factual setting. Until the various affected markets stabilize, sound predictive judgments about the effects of maintaining, modifying, or eliminating the Prime Time Access Rule will remain problematic at best and more likely flatly impossible. Therefore, whereas the Commission now may wish to air the various arguments raised by the three petitioners, it ought confine its

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consideration of a lengthier review period unencumbered by a presumption that the rules should sunset. On the other hand, network interests have urged the court to vacate the Commission's decision and eliminate the remaining rules immediately.

[10] For example, the consent decree provisions prohibiting the networks from acquiring options for network exhibition of a program for periods in excess of four years expire in 1995. The consent decree provisions limiting network exclusivity with respect to exhibition rights to the length of the network run for prime time exhibition, four years for non-prime time stripping, and three years for other uses, expire in 1995 for CBS and ABC. They expired in 1992 with respect to NBC. *See United States v. National Broadcasting Co.*, 449 F.Supp. 1127 (C.D. Ca. 1978); *United States v. CBS, Inc.: Proposed Final Judgment and Competitive Impact Statement*, 45 *Fed. Reg.* 34463 (May 22, 1980).

present analysis to the arguments raised therein. No reason exists to use these petitions as a launch pad for an extensive, full-blown analysis of the Prime Time Access Rule; every reason exists to wait until the recent changes in the network financial interest and syndication rules play out in the marketplace.

Channel 41 argues that the Commission's having attempted to address the financial interest and syndication rules is something entirely separate from the impact of the off-network prohibition on local stations.[11] Any suggestion that the financial interest and syndication rules are unrelated to the Prime Time Access Rule or even just the off-network prohibition is ludicrous. Indeed, as recognized by the court in *Mt. Mansfield v. FCC, supra,* the Commission adopted the financial interest and syndication rules, *inter alia,* "essentially to prevent indirect circumvention of the prime time access rule...." Thus, the financial interest and syndication rules were adopted to provide an additional layer of protection beyond the Prime Time Access Rule, in particular, to "prevent indirect circumvention of the prime time access rule, and to encourage the 'development of diverse and antagonistic sources of program service.'"*Mount Mansfield, supra,* 442 F.2d at 476.

The determination that the financial interest and syndication rules no longer are necessary far from suggests the Prime Time Access Rule also is unnecessary. It reflects only the Commission's view that the additional

[11] Channel 41 Petition at 10, n.15.

protection afforded by the financial interest and syndication rules no longer is necessary. The remaining protection of the Prime Time Access Rule may well be even more essential to the development of diverse and antagonistic sources of program service. Therefore, if anything, the relaxation of the financial interest and syndication rules calls for even greater caution in reviewing the off-network prohibition for possible elimination or modification.

D. Calls for a Level Playing Field from Those Who Occupy the High Ground Lack Credibility.

INTV fully understands that the established networks and their affiliates have found this growing competition troublesome.[12] Their calls for relief and a level playing field, however, remain far from compelling. The established networks and their affiliates occupy the highly advantageous position that derives from their entrenched superior position in the marketplace. They continue to enjoy superior national reach by virtue of their fully-developed affiliate systems. The bulk of affiliates enjoy superior local reach by virtue of their VHF facilities.[13] Thus, the established networks and their affiliates are mature, effective competitors which continue to hold the high ground in every respect. In their enviable and entrenched position above the field, their calls for a level playing field come easily, but such calls

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[12] Indeed, they all, but suggest the sky is falling.

[13] The superior coverage characteristics of VHF versus UHF television are well-established. *See, e.g.,Network Television Broadcasting,* 26 FCC 2d 772, 784 (1970).

beg credulity. The Commission must not heed their call and squander the opportunity to write the most significant chapter in the Prime Time Access Rule success story.

E. The Prime Time Access Rule is a Notable Success Story in the Annals of Regulation in the Public Interest.

The various petitioners have offered no remotely compelling *public interest* rationale for any modification of the Prime Time Access Rule. Furthermore, petitioners ignore the significant *public interests* which the Prime Time Access Rule continues to serve.

Indeed, the Prime Time Access Rule is a regulatory success story. Among the most significant of those benefits has been an invigorated independent television industry. The most obvious beneficiary has been the public, which now enjoys not only more television in the form of additional local stations, but also more diverse television programming. Moreover, as a result of the growth and development of independent television, a splendid opportunity exists for fulfillment of the ultimate objectives of the Prime Time Access Rule. Now, after more than 20 years, production of non-network prime time programming is becoming a reality. Now, after more than 20 years, a fourth network is emerging and fifth and sixth networks are poised for measured launches in the coming years. These trends can continue only if a financially sound and secure base of independent stations exists.

Pulling the props out from under the independent television industry today would cripple the efforts of the independent television industry to play its vital and unique role in fulfillment of the objectives of the Prime Time Access Rule. INTV's member stations wish to maintain their vitality and continue to offer the public an unprecedented array of independent station programming. They wish to maintain their ability to underwrite the risk inherent in the acquisition and exhibition of new prime time entertainment programming. They wish to maintain their ability to provide an affiliate base for Fox and the other soon to emerge networks. With the ultimate success of the Prime Time Access Rule an attainable goal, the Commission would defy all logic, reason, and respect for the public interest if it launched prematurely and without reason into a proceeding looking towards repeal of the Prime Time Access Rule or the off-network prohibition.

INTV will show that none of the three petitioners' arguments compel commencement of further proceedings or provide any basis for a determination that the Prime Time Access Rule suffers any constitutional infirmity. INTV, therefore, urges the Commission to deny each of the pending requests.

II. THE OFF-NETWORK PROHIBITION EPITOMIZED SOUND AND RATIONAL REGULATION WHEN ADOPTED BY THE COMMISSION.

Channel 41's arguments that the off-network prohibition enjoyed no rational basis when originally adopted in 1970 and, in particular, no separate factual predicate, are fanciful and ultimately self-defeating.[14]

In attacking the Commission's original adoption of the rule, Channel 41 posits that the Commission in 1970 "simply speculated that allowing local stations to purchase and schedule any former national programming in prime time 'would destroy the essential purpose of the rule to open the market to first-run syndicated programs.'"[15] It complains that "[t]he FCC did not examine whether first-run syndication might flourish without imposing this particular programming restriction, nor did it examine any other relevant competitive questions."[16]

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[14] Channel 41 Petition at 5-8; *see also* Hubbard Petition at 4.

[15] Channel 41 Petition at 5, *citing Report and Order*, 23 FCC 2d 382, 395 (1970) [hereinafter cited as *1970 Report and Order*, 23 FCC 2d at]; and *Second Report and Order*, 50 FCC 2d 829, 848 (1975) [hereinafter cited as *1975 Report and Order*].

[16] Channel 41 Petition at 5. Channel 41 places great reliance on the views of then FCC Chairman Dean Burch to the effect that the off-network prohibition enjoyed no distinct factual support in the record. Channel 41 Petition at 6. However, the late Chairman's concerns were rooted in his belief at the time that the Commission had adopted the Prime Time Access Rule as a result of its dissatisfaction with the programming then offered by the networks:

> I believe that an unstated premise of the rule adopted today, and one which I think must be faced, is that if a majority of the Commission were satisfied with the present network product, this rule would be deemed unnecessary.

1970 Report and Order, 23 FCC 2d at 412 (Dissenting Statement of Chairman Dean Burch). Thus, with due regard to the late Chairman, his reticence to endorse the off

The off-network prohibition, however, was and is a logical and necessary adjunct to the basic Prime Time Access Rule. As Channel 41 acknowledges, the Prime Time Access Rule was designed to "multiply competitive sources of television programming" by "[opening] access to valuable nighttime hours to independent producers."[17] At that time, the Commission found that high cost, prime time syndicated programming had virtually disappeared.[18] Programming from the three national television networks dominated prime time.[19] What syndicated programming that did appear in prime time increasingly consisted of off-network programs.[20] The Commission's factual record was considered "exhaustive."[21] Indeed, the

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network prohibition, while understandable, is of no moment. One also might note that history has been less than kind to the late Chairman's predictions in his dissenting statement. For example, he predicted that the rule would not be beneficial to new UHF independents. However, UHF television has developed significantly under the Prime Time Access Rule -- as even Channel 41 recognizes. Channel 41 Petition at 14. Additionally, he saw subscription television as an alternative to free broadcast television and one which could "make a genuine contribution to diversity." *1970 Report and Order*, 23 FCC 2d at 417. Subscription television, however, was a flash in the pan, and even the cable television based pay and pay-per-view services which have developed make only the most marginal contribution to diversity. Their staples remain feature film and sports programming.

[17] *1970 Report and Order*, 23 FCC 2d at 382, 384.

[18] *1970 Report and Order*, 23 FCC 2d at 385.

[19] *Id.*

[20] *Id.*

[21] *Memorandum Opinion and Order*, 25 FCC 2d 318, 319 (1970).

Commission's rulemaking proceeding lasted five years before the first rule was actually adopted.[22]

To attenuate this network dominance of prime time, the Commission determined to clear an hour of prime time for non-network programming. With respect to off-network programming, the Commission concluded:

> Off-network programs may not be inserted in place of the excluded network programming; to permit this would destroy the essential purpose of the rule to open the market to first run syndicated programs.[23]

In other words, no market for original first-run programming could develop if stations simply drew from an existing supply of already produced "previously shown" programs. The Commission similarly prohibited use of another species of already produced "previously shown" programming -- feature films. Thus, the Commission simply was attempting to assure that the open hour remained open.

This focus on keeping the hour open for new production and creating sufficient demand to attract new independent producers into the prime time programming market was maintained consistently by the Commission. At the outset, the Commission realized that:

> A healthy syndication industry composed of independent producers capable of producing prime time quality programs

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[22] *1970 Report and Order*, 23 FCC 2d at 382.

[23] *1970 Report and Order*, 23 FCC 2d at 395; *see also Report and Order*, 44 FCC 2d 1081, 1087 (1974) [hereinafter cited as *1974 Report and Order*].

> must have an adequate base of television stations to use its product.[24]

Therefore, the Commission applied the Prime Time Access Rule to the 50 largest markets, which then comprised over 75% of all television households.[25] Such a substantial audience base was considered sufficient to prompt production of new non-network prime time programming.

Although the FCC had decided in 1974 to reduce the access period to one-half hour by permitting broadcast of network and off-network programming between 7:00 and 7:30 p.m. (Eastern Time), it recanted after remand of its decision by the United States Court of Appeals for the Second Circuit and essentially retained the full hour of access in prime time.[26] The Commission stated that:

> [W]e are not adopting the provisions removing restrictions from Sundays and from the first half-hour of prime time on other days. As to the latter, it appeared to us earlier that there is something to be said for increasing diversity by permitting off-network material in addition to the news and game shows which generally fill this period Monday-Friday. As a short-run proposition, this might be true. However, for the longer term, we conclude that this would have too much of an impact on the availability of cleared prime time for the development of new

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[24] *1970 Report and Order*, 23 FCC 2d at 386.

[25] *Id.* The Commission also observed that too few independent stations existed to create a sufficient market for prime time syndicated programming. *Id.*

[26] *1975 Report and Order*, 50 FCC 2d at 852.

material, and that it might tend to increase the use of stripped game shows in the second half-hour of prime time.[27]

Therefore, the Commission maintained the full hour of prime access.[28]

The Commission also refused to permit reduction of the access period and dilution of that potential market via waivers. For example, the Commission denied a request to waive the off-network prohibition to permit broadcast of 24 episodes of the off-network series *Adam 12*.[29] The Commission considered a 24 episode run a "substantial incursion into access time."[30] The fact that the show had not been shown in the market was considered insufficient to justify a waiver because the impact on new independent production was the same regardless of whether the show had appeared in the market previously.[31] Similarly, in granting a much more limited waiver for the partially off-network program *Wild Kingdom*, the Commission reiterated that the Prime Time Access Rule was designed to make available "substantial amounts of valuable prime time in major markets" to "independent sources and new programming material from

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[27] *Id.*, 50 FCC 2d at 851-852.

[28] *Id.*, 50 FCC 2d at 848.

[29] *WKEF*, 53 FCC 2d 986 (1975).

[30] *Id.*, 53 FCC 2d at 987.

[31] *Id.*

them."[32] In that case, however, the Commission granted a waiver because the program always had been produced independently of the network and because the impingement on prime time was "minor."[33]

As Channel 41 well-knows, the Commission refused it a waiver of the off-network prohibition in 1972, despite the fact WUHQ-TV was a fourth affiliate and allegedly struggling UHF station. Again, the Commission pointed to the purpose of the rule "to open up prime time in major markets for alternative sources of new program material."[34] In 1989 the Commission also considered whether to waive the rule in light of the rule's distinct purpose "to guarantee some access to the prime-time period by entities other than major network organizations."[35] Thus, the Commission has adhered to the logic of the off-network prohibition and has applied it in a manner utterly consistent with its purposes. This underscores the durability of the rule and its purposes and undermines suggestions that the rule is in any way unsound or insupportable.

The Commission also has been consistent in preventing subversion of the rule via use of programming otherwise "tainted" by network

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[32] *Mutual Insurance Company of Omaha, Inc.*, 33 FCC 2d 583 (1972).

[33] *Id.*

[34] *Id.*, 37 FCC 2d at 672.

[35] *Home Shopping, Inc.*, 4 FCC Rcd 2424 (1989).

involvement. In revising the network financial interest and syndication rules in 1991, the Commission determined to treat network-produced programming as network programming for purposes of the Prime Time Access Rule.[36]

The Commission's rationale for adopting the Prime Time Access Rule withstood judicial scrutiny in *Mt. Mansfield Television v. FCC*, 442 F. 2d 470 (2d. Cir. 1971). The court's decision upholding the rules dispels any lingering doubts about the sufficiency of the record. Therein the court found that:

> The evidence in the record leads inescapably to the conclusion that access to network affiliated stations during prime time is virtually impossible for independent producers of syndicated programming. On the basis of this conclusion, the Commission's attempt to remedy the situation is far from arbitrary; it is directed in fact to the heart of the problem.[37]

The court was no less explicit in affirming the off-network prohibition:

> The purposes of the prime time access rule justify the off-network and feature film restrictions of that rule. The Commission could properly conclude that "to permit this [use of reruns and film during the freed time period] would destroy the essential purpose of the rule to open the market to first run syndicated programs."[38]

Thus, the court considered the Commission's decision to adopt the Prime Time Access Rule and the off-network prohibition properly grounded and well-reasoned. Channel 41's claim that the Commission lacked a sound basis

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[36] *Report and Order*, 6 FCC Rcd 3094, 3145-3146 (1991), *on reconsideration*, 7 FCC Rcd 345, 380 (1991), *vacated and remanded sub nom. Schurz v. FCC*, 982 F.2d 1043 (7th. Cir. 1992).

[37] *Mt. Mansfield Television v. FCC*, 442 F.2d at 483.

[38] *Id.*, 442 F. 2d at 484.

or separate factual predicate for the off-network prohibition is itself without factual basis.

Ironically, at its core, Channel 41's position is self-contradictory and self-defeating. Channel 41 faults the Commission for failing to examine whether first-run syndication might flourish without imposing this particular programming restriction....[39] Logically, first-run syndication would be unaffected in the absence of the off-network prohibition only if network affiliated stations in the top 50 markets chose *not* to broadcast off-network programming in prime access, despite the flexibility to do so.[40] Otherwise, of course, their use of off-network programming would frustrate the basic objective of the rule, to *open* prime time to *new, non-network* material. Instead of using new product from independent sources, affiliates would be broadcasting off-network programs in prime access, thereby foreclosing any opportunity for broadcast of new, independently-produced programming. Opportunities for exhibition in the top 50 markets would decline as affiliates schedule off-network programming in prime access. The demand for new first-run programming would contract, thereby robbing the Prime Time Access Rule of its intended effect and the public of its benefits.

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[39] Channel 41 Petition at 5.

[40] "Prime access" as used herein refers to the hour of prime time reserved for non-network programming, typically 7-8 p.m. Eastern Time.

By insisting on the flexibility to use off-network programming during prime access, WUHQ-TV provides the best evidence that elimination of the off-network prohibition would eviscerate the Prime Time Access Rule. Channel 41 presumably seeks to eliminate the rule because it wishes to acquire and exhibit off-network programming during prime time without reducing its nightly broadcasts of network programs.[41] This only demonstrates and confirms the need for the off-network prohibition. As the Commission recognized in 1975:

> It is readily apparent that elimination of this restriction would lead to a large-scale incursion into cleared time by use of off-network material, sharply reducing the availability of time to sources of new, non-network material.[42]

Similarly, as Hubbard readily stated in its petition concerning off-network programming, "Obviously, local stations would want to carry these programs during the access period."[43]

This is no less true today. The following excerpt from *Broadcasting & Cable's* interview with Barry Thurston, president, Columbia TriStar Television Distribution, provides current evidence of the affiliate desire not

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[41] As the Commission observed ever so correctly in one waiver case, the need for the waiver arose from the apparent reluctance to forego any network prime time material. *Prime Time Access Rule Waivers*, 53 FCC 2d 618, 623 (1975). Channel 41's intentions with respect to use of off-network programming is confirmed by its complaint that competing independent stations may broadcast off-network programming in prime access. Channel 41 Petition at 5.

[42] *1975 Report and Order*, 50 FCC 2d at 848.

[43] Hubbard Petition at 20.

only to use off-network hit series, but also to keep them away from competing independent stations:

> CBS's WTKR-TV Norfolk was the first top-50 affiliate to pick up Seinfeld. Do you know where they plan to schedule it?
>
> They haven't indicated, but I believe they are planning to schedule it late in the afternoon in the 5-6 p.m. area. But should PTAR [the prime time access rule] go away, I think their thinking is that they have the opportunity to put it in the access time period.
>
> Does the same prospect make the show appealing to other affiliates as well?
>
> We've had a number of offers from affiliates in other top 50 markets. That's the first affiliate we've actually accepted an offer from. In some cases their idea was to buy the program, hedging their bet that PTAR would go away -- if not by fall of '95 perhaps a year later -- and that they would rather own the program than have the program scheduled against them.[44]

Therefore, Channel 41 and Hubbard, by seeking elimination of the off-network prohibition, only disprove their own position that no basis existed or exists for the off-network prohibition.

In sum, the off-network prohibition was sound when adopted and is sound today.

III. THE OFF-NETWORK PROHIBITION IS FULLY CONSISTENT WITH THE GOALS OF THE PRIME TIME ACCESS RULE.

Channel 41's argument based on the Commission's purportedly "new justification" for the Prime Time Access Rule in 1975 is a paean to superficiality. Channel 41 asserts that the rule clashes with the purpose of the

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[44] "Master of His Game," *Broadcasting & Cable* (May 16, 1994) at 20, 22.

Prime Time Access Rule in that it deprives network affiliates of the additional discretion to program their stations which the rule was designed to provide.[45] Channel 41 observes that the Commission stated that the Prime Time Access Rule would permit local affiliates to "present programs in light of their own judgments as to what would be most responsive to the needs, interests, and tastes of their communities."[46] Channel 41 offers the argument that "Indeed, on its face, this 1975 rationale directly contravenes the only practical consequence of the 'off-network' restriction -- to restrict the program choice of local affiliates."[47] On its face, indeed! The Commission hardly was taking a self-contradictory position. In context, the true focus of this statement by the Commission was a *network* programming decision versus a *licensee* programming decision:

> In evaluating the arguments of the majors and other opponents of the rule, it is important to bear in mind the rule's primary objectives: to lessen network dominance and free a portion of valuable prime time in which licensees of individual stations present programs in light of their own judgments as to what would be most responsive to the needs, interests, and tastes of their communities. At the same time, the rule seeks to encourage alternative sources of programs not passing through the three-network funnel so that licensees would have more than a nominal choice of material.[48]

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[45] *Id.* at 7-8.

[46] Channel 41 Petition at 7, *citing 1975 Report and Order*, 50 FCC 2d at 835.

[47] Channel 41 Petition at 8.

[48] *1975 Report and Order*, 50 FCC 2d at 835.